IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNY R. AUSTAD and DOROTHY AUSTAD, his wife, Appellants, vs. UNITED STATES OF AMERICA, Appellee.	)	No. 20,876

APPELLANTS' REPLY BRIEF

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I

PRELIMINARY STATEMENT

Appellants are in receipt of Brief for the Appellee and briefly respond to its argument under II C at pages 21 and 22 thereof captioned "The Defense of Willful Impairment of Security is not Available".

Appellants have argued that the District Court erred as a matter of law in holding that the Appellants were not released on their written guaranty by Appellee's wilful destruction of the security (Appellants' Opening Brief pp. 4, 5, 13-15). Under the written guaranty between the Appellants and the S.B.A. the Appellants would be released from their obligations as guarantors if the S.B.A. had caused a deterioration to the security by its wilful act or wilful failure to act (CTR 21). Appellants raised this affirmative defense in their Amended Answer (CTR 63, 64).

If it appears from the pleadings and other papers in the record that the S.B.A. may have destroyed the security by its wilful act or wilful failure to act, then factual issues are raised by this affirmative defense which would render improper the Entry of Judgment on the Pleadings, or alternatively a Summary Judgment.

II

FACTUAL ISSUES WERE RAISED BY APPELLANTS' AMENDED ANSWER WHICH RENDERED IMPROPER A JUDGMENT ON THE PLEADINGS

Appellee in its Brief argues that the defense of wilful impairment of security is not available to the Appellants, stating that the "wilful impairment of security" alleged (Appellants' Brief, pp. 3, 13-14) is merely the delay in bringing the suit (Brief of Appellee, pp. 21-22). However, the "wilful impairment of security" alleged by Appellants in their Amended Answer amounted in fact to a claim that the Appellee had wilfully failed to file suit for the purpose of causing the value of the security to be greatly diminished. Appellants' Amended Answer reads in pertinent part (CTR 63-64):

> ". . . plaintiff is estopped to recover on the written guarantee because of an unconscionable delay in bringing this action . . . which delay was wilful and greatly diminished the value of the security" (underscoring added)

In the Houff case relied upon by Appellee (United States v. Houff [W.D.Va] 202 F Supp. 471, cited at page 21 of Appellee's Brief) similar language was used in raising this wilful-impairment of-security defense:

> "The plaintiff 'by its wilful acts and its wilful failure to act . . . so managed and disposed of said collateral as to cause it to deteriorate in value . . .'"

The Court construed this language to mean that the S.B.A. had

made a deliberate attempt to sell the property at less than its full value. Counsel for Appellants however denied that they intended any such construction. All that they intended was that th S.B.A. did what it did in connection with the sale of the property not with the result. The Court stated in its opinion at page 479 of 202 F Supp:

> "On the first hearing on the motion for summary judgment I construed the allegation of wilfulness as meaning to imply a deliberate attempt that the sale should be so made that the property should bring less than its full value. And while I thought it was extremely improbable that the Guarantors could do so, I thought they should have an opportunity to prove this allegation. In the argument on the renewed motion for summary judgment, counsel for the Guarantors stated that my construction of what they meant by wilful was not what they meant in their pleading and stated that, on the contrary, they had used the word wilfully as meaning that the S.B.A. did what it did in the way of advertising the sale intentionally and therefore wilfully in that sense and that, whether they intended the result or not, the result was that the collateral did not bring its full value.
>
> In other words there is no claim that the S.B.A. intentionally sold the goods so that they would not bring their full value but rather that it intended to sell as it did sell and that the result of such sale was that, irrespective of intent as to getting full value, the goods did not in fact bring their full value." (underscoring supplied)

The Appellants in the instant case have not said, as the appellants did in Houff, that all they intended by the language in their Amended Answer was that S.B.A. did what it did in failing to file suit. The language of Appellants' Amended Answer must be construed as it was in the first instance in Houff to mean that S.B.A. delayed in bringing this action for the purpose of

diminishing the value of the security. While this may be open to some question, nevertheless if it raises an issue or issues of fact, these cannot be resolved upon a motion for Judgment on the Pleadings but only after trial.

Appellants submit that three factual issues were raised by their Amended Answer (CTR 63-64) which were not property determined in the District Court upon Appellee's Motion for Judgment on the Pleadings:

(1) Did Appellee wilfully delay in filing this action;

(2) Did Appellee's wilful delay in filing this action greatly diminish the value of the security; and

(3) Did Appellee wilfully delay in filing this action for the purpose of diminishing the value of the security.

III

FACTUAL ISSUES WERE RAISED BY APPELLANTS' LETTER TO THE S.B.A. DATED SEPTEMBER 19, 1961 WHICH WOULD RENDER IMPROPER A SUMMARY JUDGMENT

In addition to their Amended Answer, supra, Appellants attached to their Memorandum in Opposition to Plaintiff's Motion for Judgment on the Pleadings (CTR 65-66) a letter from the Appellant J. R. Austad to the Appellee S.B.A. dated September 19, 1961 (CTR 67). This letter was not excluded by the District Court and accordingly Appellee's Motion for Judgment on the Pleadings

may be considered as one for Summary Judgment under Rules 12(c) and 56 of the Federal Rules of Civil Procedure. Rule 12(c) reads in pertinent part:

> "If on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56"

The letter from Appellant J. R. Austad to the S.B.A. dated September 19, 1961 reads in part as follows:

> "It has come to my attention that even the Ducommun took possession of the property under their second mortgage and subject to the first mortgage (S.B.A.) that to date only interest payments have been made.
>
> It would appear to me that a company as large as the Ducommun who is leasing out the entire plant to two firms, would certainly be in a position to do much better than that even from the income of the rentals. I feel that in this respect S.B.A. is not protecting their interest by allowing Ducommun to use all of the facilities, allow them to run down and still not make the mortgage payments . . ."
>
> (underscoring supplied)

Appellant's letter (CTR 67) clearly implies that the Appellee S.B.A. was permitting Ducommun, the lessee of the security, to "run down" said security and to continue as lessee by making interest payments only without making any mortgage payments. In short, S.B.A. was wilfully causing or permitting a deterioration of the security. No affidavit or other paper was filed by the Appellee disputing the statements contained in said letter.

Appellants submit that two additional factual issues were

raised by their letter of September 19, 1961 (CTR 67) which may not properly be determined by the District Court upon Appellee's Motion for Judgment on the Pleadings treated as a Motion for Summary Judgment:

(1) Did Appellee wilfully deteriorate the security by failing to collect mortgage payments as prescribed in the mortgage, and

(2) Did Appellee wilfully deteriorate the security by allowing it to "run down".

IV

CONCLUSION

A crucial issue presented in the District Court was whether or not the S.B.A. caused a deterioration in the collateral by its wilful act or failure to act, thereby releasing the Appellants under their written guaranty. Factual questions were raised by the pleadings and other papers in the record concerning this issue, and accordingly it could not properly be determined upon a Motion for Judgment on the Pleadings nor upon such a motion treated as a Motion for Summary Judgment, but only after trial.

For the above reasons and the reasons heretofore set forth in Appellants' Opening Brief, the decision of the Court below should be reversed and the action remanded for further

proceedings therein.

Dated, San Francisco, California,

August 11, 1967.

Respectfully submitted,

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MESCH, MARQUEZ & ROTHSCHILD,

By Arthur H. Tibbits
Attorneys for Appellants Johnny R. Austad and Dorothy Austad, his wife.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Arthur H. Tibbits
Attorney for Appellants

PROOF OF SERVICE

ARTHUR H. TIBBITS, ESQUIRE, certifies that he is an active member of the State Bar of California and that his business address is 55 New Montgomery Street, San Francisco, California 94105, that he has served a copy of the attached Appellants' Reply Brief of Appellants Johnny R. Austad and Dorothy Austad, his wife, by placing a copy in an envelope addressed to the following person at his office address:

Robert C. McDiarmid, Esq.
Department of Justice
Washington, D.C. 20530

The envelope was then sealed and postage fully prepaid and on August 11, 1967, was deposited in the United States mail at San Francisco, California.

Executed on August 11, 1967, at San Francisco, California.

Arthur H. Tibbits